

1 THE HONORABLE TANA LIN  
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7 UNITED STATES DISTRICT COURT  
 8 FOR THE WESTERN DISTRICT OF WASHINGTON  
 9 AT SEATTLE

10 REPLENIUM INC.,

11 Plaintiff,

12 v.

13 ALBERTSONS COMPANIES, INC.,

14 Defendant.

CASE NO. 2:24-cv-1281-GJL

**PLAINTIFF REPLENIUM INC.’S  
 MEMORANDUM OF LAW IN  
 RESPONSE TO DEFENDANT  
 ALBERTSONS COMPANIES, INC.’S  
 MOTION TO SEAL**

NOTE ON MOTION CALENDAR:  
 November 1 , 2024

16 Replenium Inc. (“Replenium”) files this response to Albertsons Companies, Inc.’s  
 17 (“Albertsons”) Motion to Seal (the “Motion to Seal”). Dkt. 21. Albertsons filed the Motion to Seal  
 18 certain exhibits attached to its Motion to Dismiss at the request of Replenium, but maintains that all  
 19 of these exhibits, Exhibits 1-8, 11-13, and 16-20 to the Declaration of Aaron Schaer, should be filed  
 20 publicly.<sup>1</sup> Dkt. 21 at 1. Replenium files this response in support of its request to seal Exhibits 11,  
 21 12, 16, 17, 18, 19, and 20 and Exhibits 1, 2, and 5.<sup>2</sup> These Exhibits contain either highly confidential  
 22 and competitive pricing information or trade secrets, which would harm Replenium’s business and  
 23 competitive standing if filed publicly. Courts consistently recognize the importance to businesses of

24 <sup>1</sup> Unless otherwise noted, references to Exhibits herein are references to the Exhibits attached to the Declaration of  
 25 Aaron Schaer dated October 11, 2024. Dkt. 23.

26 <sup>2</sup> Replenium will agree to unseal the following Exhibits to the Schaer Declaration: 3,4,6,7,8, and 13, and thus will not  
 be addressing those in this response.

1 keeping under seal information, like pricing information, that could harm its competitive standing  
 2 if made public.<sup>3</sup> Similarly, courts agree that trade secrets should be kept under seal, and that a  
 3 motion to seal is not the forum for litigating whether certain information constitutes protectable  
 4 trade secrets.

#### **FACTUAL AND PROCEDURAL BACKGROUND**

6 Replenium is a Software as a Service (SaaS) company that provides groundbreaking auto-  
 7 replenishment services to grocery retailers utilizing Replenium's trade secret technology, know-  
 8 how, and processes. Dkt. 1 ("Compl.") ¶ 1. In June 2020, Replenium and Albertsons entered into a  
 9 Mutual Non-Disclosure Agreement ("MNDAA") to "share information for the purpose of evaluating  
 10 the suitability of entering into a business relationship or in furtherance of an existing business  
 11 relationship." *Id.* ¶ 31. And in October 2020, Replenium and Albertsons entered into a Master  
 12 Service Agreement ("MSA") under which Replenium agreed to provide a first-of-its-kind auto-  
 13 replenishment solution (the "Replenium Platform") to Albertsons and its customers. *Id.* ¶¶ 2, 36.  
 14 The MSA incorporated the terms of the MNDAA and further provided that Albertsons would use  
 15 reasonable efforts to protect Replenium's intellectual property rights. *Id.* ¶ 38. Pursuant to the  
 16 MNDAA, and later the MSA, Replenium began sharing its trade secrets and confidential information  
 17 with Albertsons. *Id.* ¶¶ 50-66. Replenium did so through PowerPoint presentations, email, Microsoft  
 18 Teams messages, Slack, weekly meetings, and other forms of communication. *See id.* ¶¶ 52-62.

19 The parties initially agreed to a December 31, 2020, Commercial Launch date for the  
 20 solution, which was later amended to March 15, 2021. *Id.* ¶¶ 67-68. But, despite years of work,  
 21 during which Replenium shared its trade secret and confidential information with Albertsons,  
 22 Albertsons never launched the Replenium Platform. Instead, Albertsons began secretly developing  
 23 its own version of the Replenium Platform while it continued to work with Replenium and receive  
 24

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25 <sup>3</sup> Replenium maintains that none of these Exhibits are appropriate for consideration on a motion to dismiss as they  
 26 were not incorporated by reference in the Complaint, and it is inappropriate for Albertsons to gratuitously make them  
 public as part of its improper Motion to Dismiss strategy that relies on facts outside of the Complaint.

1 its trade secrets. *Id.* ¶ 112. After obtaining Replenium’s trade secret and confidential information,  
 2 Albertsons terminated the MSA and launched its own auto-replenishment platform. *Id.* ¶¶ 107, 116.

3 On August 19, 2024, Replenium initiated this action against Albertsons alleging, among  
 4 other things, misappropriation of Replenium’s trade secrets in violation of the Defend Trade Secrets  
 5 Act, 18 U.S.C. § 1836 et seq., and the Washington Uniform Trade Secrets Act, R.C.W. § 19108.010,  
 6 et seq, as well as breach of contract claims. *See generally* Compl. On October 11, 2024, Albertsons  
 7 filed a motion to dismiss the Complaint. Dkt. 22. Albertsons also filed a motion to seal its Exhibits  
 8 filed with its motion to dismiss at Replenium’s request, but Albertsons maintains that the Exhibits  
 9 should not be sealed. *See* Dkt. 21 at 1.

10 **ARGUMENT**

11 **I. Legal Standard**

12 “[U]nless a particular court record is one ‘traditionally kept secret,’ a strong presumption in  
 13 favor of access is the starting point.” *Electronic Arts, Inc. v. United States District Court*, 298 F.  
 14 App’x 568, 569 (9th Cir. 2008) (quoting *Kamakana v. City and County of Honolulu*, 47 F.3d 1172,  
 15 1178 (9th Cir. 2006)). But that presumption is rebuttable by articulating “compelling reasons  
 16 supported by specific factual findings.” *Kamakana*, 447 F.3d at 1178. “Compelling reasons” include  
 17 preventing judicial documents from being used “as sources of business information that might harm  
 18 a litigant’s competitive standing.” *Electronic Arts*, 298 F. App’x at 569 (quoting *Nixon v. Warner*  
 19 *Commc’ns, Inc.*, 435 U.S. 589, 598 (1978)). Similarly, courts in this district have “routinely sealed  
 20 documents that contain trade secret information and confidential or proprietary information that may  
 21 cause competitive harm.” *Blockchain Innovation, LLC v. Franklin Res, Inc.*, 2024 U.S. Dist. LEXIS  
 22 181306, at \*6 (N.D. Cal. Oct. 3, 2024) (collecting cases).

1       **II. Compelling Reasons Exist for Exhibits 1, 2, 5, 11, 12, 16, 17, 18, 19, and 20 to be Filed**  
 2       **Wholly or Partially Under Seal or With Limited Redactions**

3       A. Exhibits Containing Sensitive Financial Information and Information Which, if  
 4       Disclosed, Would Place Replenum at a Competitive Disadvantage, Should be  
       Sealed.

5           Exhibit 1 to the Schaer Declaration is the Statement of Work (“SOW”) entered between  
 6       Albertsons and Replenum, and Replenum is seeking a partial sealing of this document to ensure  
 7       that its sensitive pricing information remains confidential. In particular, Replenum is seeking to file  
 8       under seal Appendix A and Appendix C to the SOW. Appendix A discloses sensitive financial  
 9       information related to the fees that Replenum negotiated with Albertsons to earn pursuant to the  
 10      MSA. Appendix C discloses a detailed list of the service features Replenum was to provide to  
 11      Albertsons pursuant to the MSA. Replenum’s proposed redacted version of Exhibit 1 is attached to  
 12      the Locker Declaration as Exhibit A.

13           The public disclosure of Replenum’s fee structure and the features that Replenum would  
 14      provide in return has great potential to harm it in future contract negotiations with customers and  
 15      potential customers. *See Electronic Arts*, 289 F. App’x at 569 (observing that “pricing terms, royalty  
 16      rates, and guaranteed minimum payment terms” is the “precise sort of information” that may harm  
 17      a litigant’s competitive standing); *Fed. Trade Comm’n v. Qualcomm Inc.*, 2019 U.S. Dist. LEXIS  
 18      1289, at \*15 (N.D. Cal. Jan. 3, 2019) (finding compelling reasons for “information that, if published,  
 19      may harm [a party’s] or third parties’ competitive standing and divulges terms of confidential  
 20      contracts, contract negotiations, or trade secrets”). This information is confidential and not shared  
 21      with outside parties. Disclosure of this pricing information would put Replenum at a disadvantage  
 22      in future contract negotiations and would harm Replenum’s competitive standing, and thus, at least  
 23      Appendices A and C to the SOW of Exhibit 1 should remain under seal. *See Cypress Semiconductor*  
 24      *Corp. v. Fujitsu Semiconductor, Ltd.*, 2020 U.S. Dist. LEXIS 33789, at \*4 (N.D. Cal. Feb. 26, 2020)  
 25      (noting courts seal information which could put a party “at a disadvantage in future negotiations”  
 26      because “it could harm the movant’s competitive standing”).

1       Similarly, a portion of Exhibit 5, which is Amendment Number One to Statement of Work,  
 2 should remain sealed as it contains Replenium's hourly rate and detailed description of Replenium  
 3 Platform-specific work performed at Albertsons' request. Replenium's proposed redacted version  
 4 of Exhibit 5 is attached to the Locker Declaration as Exhibit B. Replenium's hourly rates and details  
 5 of work performed in connection with the Replenium Platform are not publicly available. Consistent  
 6 with the above discussion, Replenium's competitive standing would be at risk if this confidential  
 7 pricing information was publicly disclosed.

8       Furthermore, it appears that Albertsons is not contesting the sealing of "certain payment  
 9 information," based on its statement in its Motion to Seal at 1. Replenium's requests to seal both  
 10 Exhibits 1 and 5 are narrowly tailored to only seek sealing of properly sealable material, as it is only  
 11 seeking to seal this sensitive pricing information. *See Local Rule (5)(g)(3).*

12       B.     Exhibits Disclosing Trade Secrets Should be Sealed.

13       Exhibits 2, 11, 12, 16, 17, 18, 19, and 20 should be sealed because they divulge Replenium's  
 14 confidential and trade secret information.

15       •     Exhibit 2, should be filed, in part, under seal. Replenium's proposed redacted version  
 16 of Exhibit 2 is attached to the Locker Declaration as Exhibit C. Exhibit 2 is a presentation shared by  
 17 Replenium with Albertsons, entitled "Auto-Replenishment @ Albertsons, Tech Overview – June  
 18 23, 2020." This presentation details, among other things, the structure of Replenium's Azure  
 19 architecture, user and data flow, auto-replenishment recurring order flow, and various order- and  
 20 item-level features which differentiate Replenium's systems from its competitors' systems and, in  
 21 any event, would give competitors insight into Replenium's confidential business presentations.  
 22 Replenium seeks to have slides with numbers 12-16 filed under seal, as well as slides 39 and 40.  
 23 Slides 12-16 consist of trade secrets and make up the technology overview section of the  
 24 presentation. Slides 39 and 40 consist of Replenium's recommended implementation features,  
 25 which constitute proprietary and confidential business information.

1           •     Exhibit 11 consists of an email, which is not referenced, in the Complaint, either  
 2 directly or indirectly, and is thus improperly attached to Albertsons' Motion to Dismiss as it is  
 3 undisputedly not incorporated by reference. *See Khoja v. Orexigen Therapeutics, Inc.*, 899 F.3d 988,  
 4 1002 (9th Cir. 2018) (documents that do not form the basis of the complaint but are merely used to  
 5 create defenses to well-pled allegations are not incorporated by reference). This exhibit should be  
 6 sealed as it "implicates [a party's] business interests yet is inconsequential to the merits of the  
 7 underlying dispute." *Silver Fern Chem., Inc. v. Lyons*, 2023 U.S. Dist. LEXIS 124575, at \*5 (W.D.  
 8 Wash. Jul. 19, 2023). It injects information related to payments that are not raised by Repleniум its  
 9 in complaint. Moreover, this email attaches a "Contract/Cost Alignment & Resolution" PowerPoint  
 10 that includes Repleniум cost information and projected financial data, which is properly sealed  
 11 information. *See Clean Crawl, Inc. v. Crawl Space Cleaning Pros, Inc.*, 2019 U.S. Dist. LEXIS  
 12 215122, at \*3 (W.D. Wash. Dec. 13, 2019) (granting motion to seal to redact "historical, present,  
 13 and projected financial data . . . which would harm [a party's] business interests if made public").  
 14 Moreover, the Exhibit 11 email attaches the SOW, which contains the Appendices A and C, which  
 15 Repleniум has sought to seal, as discussed *supra*.

16           •     Exhibit 12, titled "Albertsons User Stories," is another presentation shared by  
 17 Repleniум with Albertsons under the MNDA, and details the Repleniум platform's underlying  
 18 processes as well as the Repleniум-designed customer user experience. Repleniум seeks to file  
 19 under the seal the entirety of the presentation, as a competitor could take the information contained  
 20 to assist therein to assist it in building a competing production. However, in particular, the  
 21 information at slides 5, 11, 12, 19, and 26 contain information that would provide, together with  
 22 other confidential Repleniium information, a roadmap to a competitor seeking to build an auto-  
 23 replenishment solution.

24           •     Exhibit 16, a presentation titled "Repleniум System Architecture," details the  
 25 process flow and system interactions that enable Repleniум's full-basket auto replenishment system  
 26 to function. This presentation discusses the way in which Repleniium implements its technology to

1 enable auto-replenishment functionality, when and in what instances information is requested and  
 2 sent from Replenium's systems, as well as how Replenium's auto-replenishment subscriptions  
 3 function. These details would be valuable to a competitor of Replenium in expediting the process  
 4 of building an auto-replenishment solution.

5       • Replenium is seeking to seal Exhibit 17, a document titled Replenium SDK for iOS,  
 6 as it details Replenium's proprietary software development kit, which is not shared publicly, and is  
 7 only shared with Replenium partners pursuant to a non-disclosure agreement because it details the  
 8 methods by which Replenium's platform can be called for information.

9       • Exhibit 18, a document titled "Replenium API End-Points," details the methods by  
 10 which Replenium's application programming interface could be called to return information from  
 11 Replenium's back-end system, as well as providing insight into the ways in which Replenium  
 12 organizes and structures its underlying systems. This document contains trade secret and business  
 13 competitive information, particularly the information contained at pages 5 and 7 through 11 of this  
 14 document and must be kept under seal.

15       • Exhibit 19, a June 1, 2023, email chain between Replenium employees, including its  
 16 Chief Technology Officer ("CTO") Umair Bashir, and Albertsons employees, includes discussion  
 17 of the functionality of Replenium's back-end system, as well as detailed information from  
 18 Replenium's CTO responding to Albertsons' targeted questions concerning the functionality and  
 19 logic of the Replenium Platform and a specific feature called Chart & Checkout. This business logic  
 20 would reveal Replenium's trade secrets, as set forth in its Complaint.

21       • Exhibit 20 is a collection of Slack messages between Replenium and Albertsons  
 22 employees discussing the functionality and logic of Replenium's system for purposes of  
 23 troubleshooting issues raised by Albertsons. These messages discuss the underlying logic of  
 24 Replenium's trade secrets and the way in which they are implemented for purposes of enabling  
 25 Replenium's auto-replenishment services, including Cart & Checkout.

1 All of these communications and presentations were shared with Albertsons by Replenum  
 2 pursuant to the strict terms of the MNDA (and MSA) governing the parties' communications. Ex. 3.  
 3 These documents address confidential and trade secret information which are commonly sealed. See  
 4 *Blockchain*, 2024 U.S. Dist. LEXIS 181306, at \*6; *New Freedom Ops LLC v. Iovino*, 2023 U.S.  
 5 Dist. LEXIS, at \*4 (W.D. Wash. Jan. 19, 2023). The disclosure of this information would cause  
 6 substantial and irreparable harm to Replenum by divulging its confidential and trade secret  
 7 information, which is at the heart of this litigation. Replenum's competitors could be able to discern  
 8 from these documents—either directly or indirectly through additional analysis and research—the  
 9 functionality of Replenum's trade secrets that could assist them in building a competing auto-  
 10 replenishment technology and cause further damage to Replenum.

11 Albertsons asserts that these exhibits should be filed publicly because it “believes much of  
 12 the material is already in the public domain[, ]and thus inappropriate for trade secret and  
 13 confidentiality treatment.” Dkt. 21 at 1. But “[a] motion to seal is not the proper context for the  
 14 court to decide these trade secret issues,” particularly “before the parties and the court engage in a  
 15 full analysis of the law and the merits of [Replenum’s] claims.” *PTP OneClick, LLC v. Avalara,*  
 16 Inc., 2019 U.S. Dist. LEXIS 202213, at \*9-10 (W.D. Wash. Nov. 21, 2019); *see United Tactical*  
 17 *Sys., LLC v. Real Action Paintball, Inc.*, 2015 U.S. Dist. LEXIS 7168, at \*9 (N.D. Cal. Jan. 21,  
 18 2015) (concluding that “a motion to seal is not the proper vessel to explore” the plaintiff’s trade  
 19 secrets claim”). The ““compelling reasons” standard only requires that the court determine that  
 20 disclosure might become a vehicle for improper purposes, including the release of trade secrets.”  
 21 *PTP OneClick*, 2019 U.S. Dist. LEXIS 202213, at \*10 (citations and internal quotation marks  
 22 omitted). Albertsons may move to unseal these Exhibits after the Court reaches a final ruling on  
 23 Replenum’s trade secret claims, but not before. *Id.* at \*11. But permitting the publication of these  
 24 confidential and trade secret documents at this juncture, prior to any determination on the merits,  
 25 would significantly threaten Replenum’s business, which has already been damaged by Albertsons  
 26 through its improper misappropriation of its trade secrets.

\* \* \*

Replenum has accommodated the public's right of access by narrowly limiting the information sought to be filed under seal to only information related to the parties' nonpublic, technical, product development information. Pursuant to Local Rule (5)(g)(3), Replenum seeks only to have sealed confidential material in an effort to provide public access to the remainder of the material. The public disclosure of the sealed information would cause significant competitive harm to Replenum.

## **CONCLUSION**

For the foregoing reasons, Replenum respectfully requests that the Court order Exhibits 11, 12, 16, 17, 18, 19, and 20 remain sealed, and Exhibits 1, 2, and 5 be filed with the aforementioned specified pages redacted.

DATED this 28th day of October

**SUMMIT LAW GROUP, PLLC**

I certify that this memorandum contains 2,641 words, in compliance with the Local Civil Rule

By s/Lawrence C. Locker

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## **CERTIFICATE OF SERVICE**

I hereby certify that on this day I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

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DATED this 28<sup>th</sup> day of October 2024.

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PLAINTIFF REPLENUIUM INC.'S MEMORANDUM OF  
LAW IN RESPONSE TO DEFENDANT ALBERTSONS  
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